85-1498

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1985

MARTHA U. MOORE and CHARLES MOORE,
Petitioners

vs.

VOLKSWAGENWERK, A.G., VOLKSWAGEN OF AMERICA AND SOUTHERN VOLKSWAGEN,
Respondents

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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MARTHA U. MOORE and CHARLES MOORE,
Petitioners

vs.

VOLKSWAGENWERK, A.G., VOLKSWAGEN OF AMERICA AND SOUTHERN VOLKSWAGEN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, Martha and Charles Moore, respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 13, 1985.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Fourth Circuit appears in the Appendix hereto, as well as the official transcription of the opinion of the District Court for the District of Maryland.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on December 13, 1985. This Petition for Writ of Certiorari was filed within ninety days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254.

QUESTION PRESENTED

Does a trial court lack jurisdiction to order a new trial on behalf of a party who has failed to file a motion for a new trial pursuant to Rule 59 of the Federal Rules of Civil Procedure or join such a motion with a motion for judgment N.O.V. as permitted under Rule 50(b) where more than ten days have elapsed since entry of judgment and where a timely-filed motion for judgment N.O.V. has been denied?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Rules 50(b) and 59, Federal Rules of Civil Procedure:

> Rule 50. Motion for a Directed Verdict and For Judgment Notwithstanding the Verdict.
>
> > (b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motions. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and

to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

Rule 59. New Trials; Amendment of Judgments.

(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of new judgment.

(b) Time for Motion. A motion for new trial shall be served not later than 10 days after the entry of the judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits, they shall be

served with the motion. The opposing party has 10 days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than 10 days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

As amended Dec. 27, 1946, eff. March 19, 1948; Feb. 1966, eff. July 1, 1966.)

STATEMENT OF THE CASE

This is a strict products liability action brought by Martha and Charles Moore to recover for devastating injuries Mrs. Moore sustained when the seatbelt-shoulder harness assembly she was wearing failed to lock up during a collision. The respondents are Volkswagenwerk, A.G. (hereinafter VWAG), the manufacturer of the Type II Volkswagen in which Petitioners were riding; Volkswagen of America (hereinafter VOA), its American subsidiary; and Southern Volkswagen (hereinafter Southern), the seller

of the vehicle. The substantive legal basis for the action is Section 402A of the Restatement of Torts (2d) which has been adopted as the law of Maryland. Section 402A makes manufacturers and sellers *jointly and severally liable* for injuries caused by their defective products. Jurisdiction in the Federal District Court for the District of Maryland was based upon diversity of citizenship and an amount in controversy in excess of Ten Thousand Dollars ($10,000.00).

Following a three week jury trial, the jury returned a verdict for Martha and Charles Moore, and against the defendants in the amount of $250,000.00. Defendants VWAG and VOA timely filed Motions for Judgment N.O.V./or in the Alternative, for a New Trial. Respondent Southern filed only a Motion for Judgment N.O.V. or in the Alternative, for Indemnity and/or Contribution. Southern did not file a motion for a new trial, nor join such a motion with its motion for judgment N.O.V. as is authorized by Rule 50(b), Federal Rules of Civil Procedure.

On July 11, 1984, more than forty-five days after judgment, the district court expressly denied the motions for judgment notwithstanding the verdict, but ordered new trials as to all of the defendants, including Respondent Southern. The district court grudgingly conceded that the evidence presented by plaintiffs was sufficient to support the verdict:

> "As I see this record, the sole evidence which the plaintiffs produced to support their case and their claim was the testimony of Mrs. Moore, the contradictory testimony of Mr. Moore, and the doubtful testimony of William Parker that Mrs. Moore was wearing a seatblet at the time of the collision. *One could infer, therefore, that Mrs. Moore's seatbelt did not work, and that under some theory of law the defendants might be*

liable. Under Rule 50(b) of course, I am not to judge credibility, and it is for that reason that I do not go the J.N.O.V. route. But as I indicated, I think this record comes perilously close to a situation where the J.N.O.V. might be warranted." (Emphasis supplied.)

The court then went on to judge credibility as it was permitted to do in ruling upon a motion for new trial. The Court held that the verdict was against the weight of the evidence, based upon the use of evidence in an improper manner, and based on evidence that was incorrect in fact.

Petitioners filed an immediate appeal from the district court's order granting a new trial as to Respondent Southern alleging that the district court lacked the power to grant a new trial as to Southern and requesting reversal and reinstatement of the verdict against Southern. Petitioners declined to retry the case against VWAG and VOA, and suffered an involuntary dismissal, choosing instead to file a second appeal urging as error the grant of a new trial as to all defendants. The two appeals were consolidated for argument and decision by the Court of Appeals for the Fourth Circuit.

The Court of Appeals held that the grant of the new trial was proper as to Volkswagenwerk, A.G., and Volkswagen of America, finding that the trial court had not abused its discretion when it held that the verdict was against the weight of the evidence. The new trial was proper as to Respondent Southern for two reasons: 1. the District Court was not compelled to risk inconsistent verdicts by ordering a new trial for VWAG and VOA, and not Southern; and, 2. that the rule set out by the majority in *Jackson v. Wilson Trucking Co.*, 243 F.2d 212 (DC Cir., 1957), i.e., that a new trial may not be granted pursuant to

Rule 50(b), Federal Rules of Civil Procedure, unless judgment notwithstanding the verdict was warranted, is inapplicable in cases such as the instant one involving multiple parties who may be jointly liable.

Petitioners request this Court to grant certiorari to determine whether the district court exceeded its power in ordering a new trial as to Southern Volkswagen where the trial court had held that judgment N.O.V. was not appropriate; where Southern did not file a motion for new trial nor join such a motion with its motion for judgment N.O.V. as permitted by Rule 50(b); and where more than ten days had elapsed since the entry of judgment. Implicit in the question presented is whether the *Jackson* rule is the proper interpretation of Rule 50(b) and if so, whether the Court of Appeals for the Fourth Circuit erred in departing from the Rule in this case on the basis that it involved multiple parties and joint *and* several liability.

REASONS FOR GRANTING WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF RULE 50(b), FEDERAL RULES OF CIVIL PROCEDURE.

In this case, the Court of Appeals for the Fourth Circuit abruptly departed from the well-settled interpretation of Rule 50(b), F.R. Civ. P., espoused in *Jackson v. Wilson Trucking Co., supra.* The court sanctioned the district court's ordering of a new trial as to Southern Volkswagen under the auspices of Rule 50(b), F.R.C.P., even though: (1) the court had explicitly denied judgment N.O.V. as inappropriate; (2) Southern had not filed a motion for new trial pursuant to Rule 59(b) nor joined such a motion with

a motion for judgment N.O.V. as authorized by Rule 50(b); and, (3) more than ten days had elapsed since the entry of judgment.

The Court of Appeals rejected the *Jackson* rule as "inapplicable" in cases such as this one where there are multiple parties who may be jointly liable, yet offered no rationale whatsoever in support of distinguishing these cases.[1] In essence, the Court held that a new trial may be granted pursuant to Rule 50(b) in cases involving multiple parties even where judgment N.O.V. is unwarranted.

Petitioners request that this Court grant certiorari to clarify first whether a court has the power to order a new trial pursuant to Rule 50(b) where, although a timely motion for Judgment N.O.V. has been made, it has been determined that Judgment N.O.V. is unwarranted. Secondly, does the involvement of multiple parties who may be jointly and/or severally liable act to expand the court's power to order a new trial on the basis of an unwarranted judgment N.O.V. These issues have not been specifically addressed by this Court.

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[1]The Court's fear of "inconsistent verdicts" was unfounded and premised upon a mistake of law. The court's characterization of this case as one involving multiple parties "who may be jointly liable" is incorrect. The doctrine of strict products liability espoused in §402 A, Restatement of Torts (2d) renders manufacturers and sellers *jointly and severally liable* for injuries proximately caused by their defective products. The distinction is crucial. Each party is severally liable for the entire amount of the verdict. Thus, had the District Court left the verdict intact against Southern, Southern would have been responsible for paying the entire $250,000 verdict. Plaintiffs could not have retried the case against VWAG and VOA because recovery of the entire verdict against Southern obviously precluded any further or double recovery on the same cause of action. Obviously then there was no potential for inconsistent verdicts.

This Court granted certiorari in *Cone v. West Virginia Pulp and Paper Co.*, 330 U.S. 212, 67 S.Ct. 752, 91 L.Ed. 849 (1946), to determine whether an appellate court had the power to direct entry of a judgment N.O.V. where no timely motion for such a judgment had been made in the district court. During the Court's discussion of Rule 50(b) generally, the Court pointed out that:

> "Rule 50(b) contains no language which absolutely requires a trial court to enter judgment N.O.V. *even though that court is persuaded that it erred in failing to direct a verdict for the losing party.*" 330 U.S. 213 at 215. (Emphasis added.)

This dicta in *Cone, supra.*, provided the basis for the District of Columbia Circuit's majority opinion in *Jackson v. Wilson Trucking Co.*, 243 F.2d 212 (D.C. Cir., 1957). The majority held that the discretion to grant lesser relief in the nature of a new trial pursuant to Rule 50(b) comes into being *only when* the record is such that the entry of judgment N.O.V. would be warranted. The *Jackson* court held that where judgment N.O.V. could not be granted, Rule 59(b) and (d), Federal Rules of Civil Procedure, govern the situation.

Judge Burger, now Chief Justice Burger, authored a powerful dissent in *Jackson* which was well received by legal commentators and scholars.[2] He urged the Court to hold that "where there is a motion for Judgment N.O.V., timely made, with or without a motion for new trial, the court has discretion to grant a new trial where the evidence is contrary to the verdict." 243 F.2d 212, 218.

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[2]The *Jackson* dissent was approved by Professor Moore [5A Moore's Federal Practice ¶50.11 (1971)]; See also, Note, 71 Harvard L.Rev. 552 (1958); Note, 33 Notre Dame L.Rev. 126 (1957); Note 5 UCLA L.Rev. 954 (1957).

Despite the scholarly controversy sparked by the Burger dissent in *Jackson*, virtually every court of appeals which has addressed this issue has followed the *Jackson* majority. In *Peterman v. Chicago, Rock Island and Pacific Railroad Co.*, 493 F.2d 88 (8th Cir., 1974) cert. den. 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1975), the Court of Appeals for the Eighth Circuit, relying upon *Jackson* and *Cone*, supra., held that the filing of a motion for Judgment N.O.V. under Rule 50(b) did not empower the court to grant a new trial where a judgment N.O.V. could not be sustained. The court rejected Judge Burger's position that the trial court should be permitted to grant a new trial if the weight of the evidence is against the verdict although the evidence is sufficient to warrant denial of Judgment N.O.V. The court held that in the absence of a new trial motion made by the defendant within ten days pursuant to Federal Rule of Civil Procedure 59(b), or in the absence of an order issued by the court within ten days of judgment pursuant to Federal Rule of Civil Procedure 59(d), the trial court lacked any power to *sua sponte* grant a new trial because of any alleged error in the instructions to the jury.

The Court of Appeals for the Eighth Circuit recently reaffirmed the *Peterman* holding in *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411 (8th Cir., 1985). Rule 50(b), by its very terms, gives a court discretion to order a new trial absent a motion therefore only where the moving party otherwise would have been entitled to judgment notwithstanding the verdict. The court held that where, as here, the court believed that judgment N.O.V. was not appropriate, "respect for the role of the jury requires strict compliance with the limits established in the Federal Rules of Civil Procedure as to when and why such a verdict otherwise may be disturbed." 767 F.2d 411, 414

The Court of Appeals for the Tenth Circuit in *Kain v. Winslow Manufacturing, Inc.*, 736 F.2d 606 (10th Cir., 1984) cert. den. 105 S.Ct. 1360, and the Court of Appeals for the Eleventh Circuit in *Alderman v. Tandy Corp.*, 720 F.2d 1234 (11th Cir., 1983), specifically rejected the *Jackson* dissent even in the limited case where a court determines that the verdict is against the weight of the evidence. The *Jackson* rule was also followed by the Court of Appeals for the Third Circuit in *American Bearing Co. v. Litton Industries*, 729 F.2d 943 (3rd Cir., 1984) cert. den. 105 S.Ct. 178 (1985), as well as by the Fifth Circuit in *Tarlton v. Exxon*, 688 F.2d 973 (5th Cir., 1982) cert. den. sub. nom. *Diamond M. Drilling Corp. v. Tarlton*, 63 U.S. 1206, 103 S.Ct. 3536.

The Court of Appeals offers no rationale for deviating from the *Jackson* rule in this case. The distinction based upon multiple parties who may be jointly liable is an illusory one calculated to disguise a holding which is truly in conflict with the overwhelming weight of authority in the circuit courts of appeal.

Petitioners can find no authority to support the Fourth Circuit's bald assertion that the *Jackson* rule is inapplicable in cases involving several parties who may be jointly liable. Nor can Petitioners conceive of any rationale for distinguishing between a single tortfeasor and joint tortfeasor situation in the application of Rule 50(b). Either every properly filed Rule 50(b) motion incorporates alternative relief in the nature of a new trial, or it does not. The number of parties and the nature of their liability surely offer no basis for departing from the *Jackson* rule.

The Court of Appeals for the Fourth Circuit relied upon three decisions in justifying its rejection of the *Jackson* rule. *Continental Casualty Co. v. United States*, 167

F.2d 107 (9th Cir., 1948), was a judge-tried case where the issue of the propriety of a new trial was discussed only in dicta and disposed of pursuant to Rule 59(a)(2), not Rule 50(b) or the *Jackson* rule. The court's reliance upon *Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385 (8th Cir., 1984) is just as inappropriate. The decision in *Ryan* turned upon application of Rule 59(b) and the Minnesota Comparative Negligence Statute. The *Jackson* rule is not even mentioned. Finally, the Fourth Circuit turns to its own decision in *Stonehocker v. General Motors Corp.*, 587 F.2d 151 (4th Cir., 1975), which ironically was not a joint tortfeasor situation and where a motion for a new trial had been filed. While Rule 50(b) was discussed, Rule 59 provided an alternative basis for decision. Not one of the decisions relied upon by the Fourth Circuit offers any support for the court's decision not to apply the *Jackson* rule, or, its unprecedented belief that the *Jackson* rule is inapplicable in cases involving parties who may be jointly liable. The conflict between the decision of the Court of Appeals for the Fourth Circuit and the decisions of the majority of the Courts of Appeals justifies the grant of certiorari to review the judgment below.

II. THE DECISION BELOW ILLUSTRATES SIGNIFICANT AND RECURRING PROBLEMS IN RECONCILING THE POLICIES UNDERLYING RULES 50 AND 59, FEDERAL RULES OF CIVIL PROCEDURE.

The Court of Appeals for the Fourth Circuit's opinion in this case has far-reaching implications in the interpretatin of Rule 50(b) and Rule 59, Federal Rules of Civil Procedure. Rule 59(d) and its ten day limitation upon the *sua sponte* ordering of a new trial by the trial court was

intended to be a restraint upon the judicial power to disturb jury verdicts. This power was to be used only in the clearest of cases where manifest unjustice is obvious upon return of the jury verdict. *Tarlton v. Exxon, supra.* If this Court were to adopt the Fourth Circuit's construction of Rule 50(b) in the instant case, the trial court would be permitted under the guise of Rule 50(b) to do what it is expressly precluded from doing under Rule 59(d)—*sua sponte* ordering a new trial more than ten days after entry of judgment.

How do we reconcile the policy of liberal interpretation and flexibility in construing the Federal Rules of Civil Procedure with the policy favoring strict compliance with the limits established in the Rules as to when and why jury verdicts may be disturbed? *Goldsmith v. Diamond Shamrock Corp., supra.* Should trial courts be empowered to fashion "appropriate relief" regardless of the nature of the relief sought by the parties?

The Court of Appeals devoted very little attention to the grounds urged under Rule 59 to justify the granting of a new trial as to Southern. Respondent Southern argued that the timely-filed new trial motion of VWAG and VOA empowered the Court pursuant to Rule 59(a)(1) to include Southern in its new trial order. At least one commentator agrees with this position. Professor Wright suggests that:

> "The ten day limit [for the grant of a new trial on initiative of the court] applies only if there is no timely motion for new trial and the court is acting entirely on its own initiative." (Wright & Miller, *Federal Practice and Procedure*, §2813 p. 59 (1973).

In this case, the Court of Appeals declined to address this issue. Two other circuit courts have squarely faced this

issue, however. In *Tarlton v. Exxon*, 688 F.2d 973 (5th Cir., 1982) cert. den. sub. nom. *Diamond M. Drilling Corp. v. Tarlton*, 105 S.Ct. 3536, 77 L.Ed. 2d 1387 (1983) and in *Kain v. Winslow Manufacturing Co., Inc. supra*, the Fifth Circuit and the Tenth Circuit respectively held that motions for new trial made by co-parties did not empower the courts to grant a new trial as to a non-moving party outside the ten day limit of Rule 59(d). However, Southern argued below that since its liability as seller of the allegedly-defective seatbelt derived from, and was co-existent with, the liability of VWAG and VOA, the pendency of their motion for new trial empowered the court under Rule 59(a) to include Southern in the order. The Ninth Circuit agreed at least in principle in *Continental Casualty Co. v. United States*, 167 F.2d 107 (9th Cir., 1948) cert. den. 69 S.Ct. 1517 (1948) when it held that the trial court could grant a new trial to the principals on the motion of their surety under Rule 59(a).

Petitioners believe that the growing litigation of issues involving Rules 50 and 59 in the courts of appeals in recent years is indicative of confusion on the part of lower courts and litigants alike. Especially when, as here, the Federal Rules of Civil Procedure are involved, this Court's interest in promoting a uniform interpretation and application of the Rules would be furthered substantially if this Petition were to be granted.

CONCLUSION

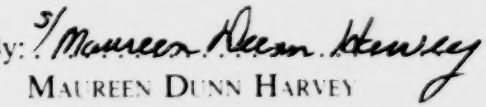
WHEREFORE, Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the Court of Appeals for the Fourth Circuit. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the new trial order be set aside, and that the jury verdict against Southern be reinstated.

Respectfully submitted,

WALLACE, CHAPAS AND ASSOCIATES

By:

HENRY H. WALLACE

By: 

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 84-1890(L)

MARTHA U. MOORE; CHARLES J. MOORE,
Appellants,

versus

VOLKSWAGENWERK, A.G., a corporation of the Federal Republic of Germany; VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation; SOUTHERN VOLKSWAGEN, INC., a Maryland corporation,
Appellees.

No. 84-2315

MARTHA U. MOORE; CHARLES J. MOORE,
Appellants,

versus

VOLKSWAGENWERK, A.G., a corporation of the Federal Republic of Germany; VOLKSWAGEN OF AMERICA, INC., a New Jersey Corporation; SOUTHERN VOLKSWAGEN, INC., a Maryland corporation,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.
NORMAN P. RAMSEY, DISTRICT JUDGE. (C/A R-79-202).

Argued: October 9, 1985 Decided: December 13, 1985

Before PHILLIPS, MURNAGHAN, and WILKINSON, Circuit Judges.

Maureen Dunn Harvey (Henry H. Wallace; Wallace, Chapas & Associates on brief) for Appellants; William N. Zifchak (Sasscer, Clagett, Channing & Bucher; Leonard L. Lipshultz; John Llewellyn Hone; Lipshultz and Hone, Chartered on brief) and Herbert Rubin for Appellees.

PER CURIAM:

Appellants contend that the district court abused its discretion in granting a new trial in this personal injury action to defendants Volkswagenwerk, A.G. ("VWAG"), Volkswagen of America, Inc. ("VOA"), and Southern Volkswagen, Inc. ("Southern"), and further that the trial court lacked authority to grant a new trial to Southern. Because we believe that the trial court acted within its discretion, we affirm.

On February 14, 1976, Martha Moore was riding in the passenger seat of her 1974 Volkswagen sedan when it was hit by another car. Moore, who was injured in the collision, claimed that she had been wearing her seatbelt, including a shoulder harness. Moore claimed that the seatbelt had "spooled out" and failed to lock up, so that instead of being restrained by the belt, she hit the dashboard and the rearview mirror.

The trial, which lasted three weeks, consisted largely of the testimony of Moore and expert witnesses on both sides. The jury also saw films of "sled tests." The films showed a dummy on a moving "sled," in a series of experiments that attempted to simulate the forces present in a collision. The jury found for the plaintiffs. VOA and VWAG asked for JNOV, or in the alternative, a new trial. Southern requested JNOV, but did not request a new trial. The trial court granted a new trial to all three defendants, and set a new trial date.

Moore told the court that she would not retry the case. The trial judge then granted defendants' motion for involuntary dismissal for failure to prosecute.

Moore now appeals, contending that the trial court abused its discretion in granting a new trial to defendants, and that the trial court had no jurisdiction to grant a new trial to Southern since Southern had not asked for a new trial. We affirm the trial court's decision to grant a new trial to all three defendants.

It is settled that a trial judge has the duty to set aside a jury verdict and grant a new trial if the verdict is against the clear weight of the evidence, or based on false evidence, or will result in a miscarriage of justice. *Wyatt v. Interstate & Ocean Transport Co.*, 623 F.2d 888, 891-92 (4th Cir. 1980). Moreover, this court will not reverse the grant of a new trial unless it finds a clear abuse of discretion or exceptional circumstances. *Williams v. Nichols*, 266 F.2d 389, 391 (4th Cir. 1959). Here the trial court acted well within its discretion.

The court found that the verdict was against the weight of the evidence, based upon the use of evidence in an improper manner, and based upon evidence incorrect in fact. It noted further that permitting the verdict to stand would result in a miscarriage of justice. Specifically, the court said that the record, "particularly that made by the plaintiff's experts, obfuscated and confused rather than assisted the jury in its determination."

The district court was obviously in a position to evaluate the credibility of the witnesses, and it found the testimony of several of plaintiff's key witnesses incredible. Dr. McElhaney assumed Moore sustained no serious head injuries, yet she was unconscious for at least a week after the accident. Dr. Brenner testified that without knowing the specifications, and without the aid of any instrument,

he could see a 1/64th inch difference between an exemplar and the subject seat belt retractor.

In addition to presenting such testimony, Moore attempted to use the sled test films for an improper purpose. The trial judge admitted the sled tests for a limited purpose: to demonstrate the manner in which stretch and burn marks appear in seat belts. Counsel for plaintiff, however, attempted to use the films to show the motion of bodies inside the car. This improper use created the potential for an unfair jury verdict.

For the foregoing reasons, we cannot say that the trial court abused its discretion in granting a new trial.

Nor was it error for the trial judge to grant a new trial to Southern, which had moved only for JNOV. A new trial was clearly warranted with respect to VWAG and VOA; the trial judge was not compelled to risk inconsistent verdicts by declining to grant a new trial to the remaining defendant.

Southern, VWAG and VOA were alleged joint tortfeasors. VWAG and VOA asked for JNOV, or in the alternative, a new trial. The district court granted a new trial to give Moore "the opportunity, if she can, to remedy the insufficiencies in the case which are apparent." To grant a new trial to VOA and VWAG, but not to Southern, would be to run the risk of inconsistent verdicts. In the interest of justice, the trial court quite naturally granted a new trial to all three defendants.

Rule 59(b) of the Federal Rules of Civil Procedure requires that a motion for a new trial be served within ten days of entry of judgment. The court may grant a new trial of its own initiative within ten days of entry of judgment.

Fed.R.Civ.P. 59(d). In addition, the court is free to grant a new trial even though one has not been requested, if the court could have granted a JNOV. *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212, 214-15 (D.C. Cir. 1957). The District of Columbia Circuit has held that when JNOV could not be granted, and a new trial has not been requested, the trial judge lacks the authority to order a new trial. *Id.* However, courts do not generally apply the *Jackson* rule to cases in which there are several parties who may be jointly liable. When a surety moved for a new trial, but the three principals did not, the Ninth Circuit has held that the district judge could order a new trial for the surety and the principals. *Continental Casualty Co. v. United States*, 167 F.2d 107 (9th Cir. 1984). *See also Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385 (8th Cir. 1984); *Stonehocker v. General Motors Corp.*, 587 F.2d 151 (4th Cir. 1975).

Here, it was not error for the district judge to grant a new trial with respect to Southern, when a new trial was clearly warranted with respect to VWAG and VOA. The decision of the district court is in all respects

AFFIRMED.

THE COURT: Well, certainly if I grant a new trial as to two of the major defendants, the interest of justice would require me to grant it all the way around. But in any event, let's take a short break, and I'll come back and let you have my judgment on it.

(Recess at 10:50 a.m.)

THE CLERK: The Court is in session.

THE COURT: Preliminarily, gentlemen, I suppose what I have before me is the issue of extent to which, if I deem new trial appropriate, it would apply across the board to all defendants. Mr. Wallace makes the point that there's no expressed motion of a new trial filed by Southern Volkswagen. There is an incorporation by reference of Roman three of the V.W. motion in the memorandum in support of the Southern Volkswagen's motion.

As a practical matter, should I grant a new trial as to Volkswagen and V.W., and view the existence of the controversy about the right to contribution between and among the various parties? I would have to necessarily grant a new trial as to Southern Volkswagen because the contribution issue would bring it back to me to pass on the status of Southern in the event of a new trial as to the others.

Now, the problem which is posed in this case is essentially this. Should I have granted a directed verdict in the case? Was I in error when I failed to grant a directed verdict in the case? Should I now, in light of the record in this case, in effect remedy that error by granting JNOV in accordance with the standards which are generally applicable to JNOV? Assuming that I measure my obligation, not

by the JNOV standards, but by the new trial standards and the interest of justice concepts which enter into the new trial standard, and the fact that in judging whether or not a new trial should be granted, there is an element of credibility which may not be present in reviewing for JNOV. The issue, therefore, before me is, should I grant the motion of Volkswagen, A.G. and Volkswagen of America, a motion for new trial? Should I grant the JNOV of that group? Should I grant Southern Volkswagen's motion for judgment notwithstanding? The issue, therefore, has to do with my approach and my determination in order to ascertain whether or not there should be a direction to enter a judgment for all defendants, and thereby entering a judgment against that of the jury in the case.

First let me say that if I go to the new trial route, I will, within the exercise of my discretion, order a new trial in the interests of justice as to all defendants, and not simply as to two defendants in the case. I have decided on the entire record of this case, it is inappropriate to let the jury verdict stand. I intend, therefore, to grant a new trial as to all defendants. That means that I am denying the NOV motions, and it is not because I lack confidence that I should grant the NOV motions. Indeed, this case is perilously close to one in which I might grant an NOV motion.

I do feel, however, that in the interest of doing justice to the plaintiff, that she should be offered the opportunity, if she can, to remedy the insufficiencies in the case which are apparent. Specifically, I find that the verdict which was rendered in this case is against the weight of the evidence, that it is based upon the use of evidence in an improper manner, and on evidence which is incorrect in fact, and

that to permit the verdict to stand would result in a miscarriage of justice in weighing the evidence and considering the credibility of the witnesses as I am required to do.

Now, *Wyatt v. Interstate and Ocean* in 623 Fed.2nd 888, 1980 Fourth Circuit case, and the other cases in this Circuit, I have a duty to set aside the verdict, in my judgment, and to grant a new trial.

The record in this case, particularly that made by the plaintiff's experts, obfuscated and confused rather than assisted the jury in its determination. Dr. McElhaney in his expert opinions, based them in large part on assumption which I believe factually, physically and otherwise were demonstrated to be baseless. I note, for example, his assumption that Mrs. Moore did not sustain serious head injuries, and I note further that there was testimony from Mrs. Moore than she was unconscious for a period of a week or ten days, and that there was a total variance between that and what I believe to be the medical testimony in the case as respects the injuries which were occasioned to the plaintiff, Mrs. Moore.

Dr. Brenner and Mr. Enz I find did not give credible testimony in this case. Dr. Brenner seesawed back and forth between design and manufacture defects. He double talked the issue when pressed by counsel and the Court. He was unable because of his total unfamiliarity with the system's design specifications and tolerances to render a valid judgment as respects what was before him did or did not meet the tolerances.

The fact that counsel assert that he need not know the specs in order to eyeball an item and pronounce that he saw a one sixty-fourth of an inch difference between an

exemplar and the subject seat belt retractor is incredible testimony. Insofar as Dr. Brenner is concerned, the fact that he did observe this very minor eight one thousandths of an inch difference without the aid of any instrument in my judgment is a patently ridiculous suggestion, but it is indicative of the scientific standards which this claimed expert purported to use in analyzing the retractor which is in question.

In retrospect, it is very doubtful that Enz should have been permitted to testify at all. Enz did not present credible testimony. It is incredible that an employee of a safety investigator should have made findings of significance to a major accident case in their shop, and not have revealed them to the leading person who controlled that safety investigation company. It is utterly incredible to suggest that groups of photographs, which were not available in the court which would have potentially and theoretically backed up Enz, were not, in fact, available to him. Enz's demeanor on the witness stand was that of a witness that I would not credit.

Insofar as the Parker testimony concerning the seat belt, he also was confronted by substantial conflicting testimony, and there is very serious doubt about the credibility of the Parker testimony.

The testimony of Mr. Moore was at best ambivalent. The earlier staements by Mr. Moore as respects the seat belt, the later statements on the witness stand by Mr. Moore as respects the seat belt, simply leave a sense of very, I'm afraid, uncertainty as respects Mr. Moore's testimony in this matter.

Mrs. Moore I have no doubt honestly believes she was wearing a seat belt, but I think that the physical evidence contradicts her. In this regard, the sled tests which were used, in my judgment, also created prejudice in this record. The sled tests were admitted for the simple purpose of demonstrating the manner in which the burn marks and the various stretch marks were created on the belts. They were, however, to a major extent attempted to be used by plaintiff's counsel as kinematics or internal motion of bodies within the interior of the Volkswagen. They were not admitted for that purpose, and they should not have been used for that purpose. That again leads to my basic judgment that to permit the verdict founded on that use of those sled tests, which were admitted for a local and limited purpose, as a general purpose of trying to prove the motion inside the vehicle of the bodies leads to a potential for a jury verdict which is basically unfair.

The experts who appeared for the defendant, in my judgment, presented physical evidence, and they were persuasive, and they withstood the challenge of cross examination. The plaintiff did not explain away the physical evidence which was presented, and I find that the Enz testimony was not credible testimony to rebut that. As I indicated, I probably should not have permitted Enz to testify in the matter at the time and in fashion in which he did testify.

Coming for the standard for granting a motion for judgment NOV, I am to look at that as though I were deciding a motion for directed verdict. That is enunciated by the various cases in our Circuit. The governing standard is clearly stated. It is whether viewing the evidence in the light most favorable to the party who secured the jury

verdict there was evidence upon which a jury could reasonably find a verdict for that party against whom the motion is directed. That's *Continental Ore v. Union Carbide* in 370 U.S. at 690, *Mays* v. Pioneer* in 502 Fed. 2nd at 106, a Fourth Circuit case in 1974, and *Ralston Purina v. Edmonds**, 241 Fed. 2nd 165, a Fourth Circuit case. The movant is not entitled to prevail if based upon the applicable law the evidence raises questions upon which reasonable minds could differ. *Haynes* v. McShane**, 394 Fed. 2nd 490, and the Presscott* case.

As I see this record, the sole evidence which the plaintiffs produced to support their case and their claim was the testimony of Mrs. Moore, the contradictory testimony of Mr. Moore, and the doubtful testimony of William Parker that Mrs. Moore was wearing a seat belt at the time of the collision. One could infer, therefore, that Mrs. Moore's seat belt did not work, and that under some theory of law the defendants might be liable. Under Rule 50B, of course, I am not to judge credibility, and it is for that reason that I do not go the JNOV route. But as I indicated, I think this record comes perilously close to a situation where the JNOV might be warranted.

In connection with this case, however, the decision which I make is as follows: I will grant a new trial as to all defendants. I think I have the right and the obligation to do this on the record of the case, and I have the right and the obligation to do it as to Southern Volkswagen because I cannot go forward with a decision on contribution on this current verdict where I think the verdict must be set aside. And, therefore, in the interests of justice, there will be a new trial granted as to all defendants, and I will return the

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*Phonetic

case to my trial docket, and we will set it in for trial at the earliest time when I can find three weeks to retry the case.

All right, gentlemen, we'll stand in recess.

THE CLERK: All rise. Court stands adjourned.

(Court adjourned at 11:15 a.m.)

* * *

I, Chris Mullery, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ CHRIS MILLERY ..... July 27, 1984

APPENDIX C

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARTHA U. MOORE, ET AL.,
Plaintiffs

v.

VOLKSWAGENWERK, A.G.,
VOLKSWAGEN OF AMERICA, INC.,
and SOUTHERN VOLKSWAGEN, INC.,
Defendants

Civil Action
No. R-79-202

ORDER

For the reasons stated this day in open Court, it is, by the United States District Court for the District of Maryland,

ORDERED:

1. That a new trial is GRANTED in this action as to all defendants;

2. That defendant Southern Volkswagen, Inc.'s motion for judgment notwithstanding verdict is DENIED;

3. That defendant Volkswagenwerk, A.G., and defendant Volkswagen of America, Inc.'s motion for judgment notwithstanding the verdict is DENIED;

4. That defendant Volkswagenwerk, A.G., and defendant Volkswagen of America, Inc.'s motion for contribution among joint tort feasors and reduction of judgment is DENIED as MOOT;

5. That defendant Southern Volkswagen, Inc.'s motion for indemnification is DENIED as MOOT;

6. That the parties agree as to a trial date on or before July 24, 1984; and

7. That the Clerk of the Court shall mail copies of this Order to all counsel of record.

.....

NORMAN P. RAMSEY
United States District Judge

APPENDIX D

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARTHA U. MOORE, and
CHARLES J. MOORE, Her Husband,
Plaintiffs

v.

VOLKSWAGENWERK, A.G.,
VOLKSWAGEN OF AMERICA, INC.,
and SOUTHERN VOLKSWAGEN, INC.,
Defendants

Civil Action
No. R-79-202

ORDER

For the reasons assigned in open Court on October 29, 1984, it is this 29th day of October, 1984, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant's October 23, 1984, motion to dismiss is DENIED;

2. That defendants' motion to dismiss for failure to prosecute, made in open court on October 29, 1984, is GRANTED;

3. That plaintiffs' claims against all defendants are DISMISSED WITH PREJUDICE;

4. That, there being no just reason for delay, final judgment be entered against the plaintiffs, and in favor of

all defendants, on the claims made by the plaintiffs against the defendants;

5. That the counterclaims and cross claims brought by the defendants, and all motions to assess costs, will be held open pending disposition of any appeals of the judgment entered this day;

6. That this case be administratively CLOSED WITHOUT PREJUDICE to the rights of the parties to reopen the case for disposition of defendants' cross claims and counterclaims, or for assessment of costs in connection with this action; and

7. That the Clerk of the Court shall mail copies of this Order to all counsel of record.

.....

NORMAN P. RAMSEY
United States District Judge

APPENDIX E

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

MARTHA U. MOORE, and
CHARLES J. MOORE, Her Husband,
Plaintiffs

v.

VOLKSWAGENWERK, A.G.,
VOLKSWAGEN OF AMERICA, INC.,
and SOUTHERN VOLKSWAGEN, INC.,
Defendants

Civil Action
No. R-79-202

JUDGMENT ORDER

There being no just reason for delay, and in accordance with the Court's order of October 29, 1984, it is this 29th day of October, 1984, by the United States District Court for the District of Maryland,

ORDERED:

1. That final judgment is hereby entered in favor of all defendants, and against the plaintiffs, on all claims of the plaintiffs against the defendants; and,

2. That the Clerk of the Court shall mail copies of this Judgment Order to all counsel of record.

.....

NORMAN P. RAMSEY
United States District Judge

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

MARTHA U. MOORE and CHARLES MOORE,
Petitioners

vs.

VOLKSWAGENWERK, A.G., VOLKSWAGEN OF AMERICA and SOUTHERN VOLKSWAGEN,
Respondents.

CERTIFICATION OF SERVICE

The undersigned, WILLIAM P. CHAPAS, one of the attorneys for Petitioners, Martha and Charles Moore, hereby certifies that on the 7th day of March, 1986, he served the foregoing Petition for Writ of Certiori on all the parties hereto, by mailing three copies by ordinary mail, postage pre-paid, addressed as follows:

WILLIAM N. ZIFCHAK, ESQUIRE
SASSCHER, CLAGETT, CHANNING & BUCHER
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Dated: March 7, 1986

William Peter Chapas

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Pittsburgh, PA 15219

FILED
APR 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1498

In The
Supreme Court of the United States
October Term, 1985

MARTHA U. MOORE and CHARLES MOORE,
Petitioners,

vs.

VOLKSWAGENWERK, A.G., VOLKSWAGEN OF AMERICA, INC. and SOUTHERN VOLKSWAGEN, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS VOLKSWAGENWERK, A.G. AND VOLKSWAGEN OF AMERICA, INC. TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the trial court acted fairly and reasonably under Rules 50 and 59 of the Federal Rules of Civil Procedure in granting a new trial as to all of the defendants when only the manufacturer and distributor had requested such relief.

RULE 28.1 STATEMENT

A disclosure of corporate affiliations and financial interests of these respondents was filed with the Fourth Circuit on August 16, 1984 in case No. 84-1890.

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No. 85-1498

In The

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October Term, 1985

MARTHA U. MOORE and CHARLES MOORE,

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vs.

VOLKSWAGENWERK, A.G., VOLKSWAGEN OF AMERICA, INC. and SOUTHERN VOLKSWAGEN, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS VOLKSWAGENWERK, A.G. AND VOLKSWAGEN OF AMERICA, INC. TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The district court rendered an opinion on an evidentiary issue in the instant case which was published as *Moore v. Volkswagenwerk, A.G.*, 575 F.Supp. 919 (D. Md. 1983). That opinion is not at issue.

STATEMENT OF THE CASE

Petitioners' presentation of the statement of the case mandates clarification of certain facts. First, the only cause of action against all defendants presented to the jury was strict liability in tort for manufacture as defined by Restatement (Second) of Torts § 402A (1965). The jury's verdict was in the amount of $50,000.00 against Southern Volkswagen, Inc. ("Southern"), the automobile dealer, and $100,000.00 each against Volkswagen of America, Inc. ("VWOA"), the automobile distributor, and Volkswagenwerk, A.G. ("VWAG"), the manufacturer. This disposition was confirmed by the jury upon direct questioning by the court. (Respondents herein briefed and argued the impropriety of this verdict in the Fourth Circuit).

The district court's decision to grant a new trial as to all respondents was partially based on the court's inability to proceed on the contribution and indemnification aspect of this strict liability for manufacture case. The court twice stated that it was "perilously close" to granting a judgment n.o.v. in favor of all defendants. It granted a new trial rather than judgment n.o.v., not because it lacked confidence in such a decision, but to give petitioners a chance to remedy the apparent insufficiencies in their case.

Following the court's order of July 12, 1984, the petitioners simultaneously filed a petition for writ of mandamus and noted the appeal in the Fourth Circuit which is the subject of the instant petition. The petition for writ of mandamus was dismissed by the court of appeals on motion made by the respondents.

A second trial was held on October 29, 1984. Petitioners after the case was called rested without presenting evidence. Judgment was entered in favor of all respondents. Petitioners then noted a second appeal, this time on the merits of the new trial order. The Fourth Circuit affirmed the district court in all respects in an unpublished opinion.

———o———

REASONS FOR DENYING WRIT

The unpublished opinion of the Fourth Circuit decided issues that are far more complex and rare than is indicated by petitioners.

The cause of action common to all of the respondents submitted to the jury was strict liability in tort for manufacture. Petitioners' evidence as to strict liability in tort was the same for Southern as it was for the other two respondents, and all three respondents presented the same defense. The jury was instructed that Southern's potential liability was derivative of the manufacturer's.

The district court granted the new trial as a result of deficiencies in petitioners' case that went to the liability of all of the respondents. There was no reason for the district court (or petitioners) to differentiate between the manufacturer and distributor on the one hand, and the dealer on the other. To do so would have created

an illogical and unreasonable situation: a judgment in favor of the manufacturer and distributor based on strict liability in tort for alleged manufacturing defects co-existent with a judgment against the dealer on the same cause of action and on the identical evidence presented. Both the district court and court of appeals labeled this situation as inconsistent verdicts. The district court allowed petitioners a fresh opportunity to present credible evidence to support their claim of strict liability for manufacture against all of the respondents. Petitioners rejected this opportunity and instead created a technical and artificial situation to test a purely procedural point. Petitioners do not now contest the district court's exercise of discretion in finding that the verdict against all of the respondents was not supported by the weight of the evidence, or the Fourth Circuit's affirmance of that decision. This remains undisturbed. To reinstate the verdict against Southern on the technical point that petitioners advance, would, therefore, create a judgment out of thin air: one based on evidence that two courts have found to be lacking.

The inconsistency of differing verdicts is self evident. Petitioners argue that since respondents are jointly and severally liable, a verdict against one obviates the inconsistency since there can be no double recovery. However, this argument ignores the reality in this case. This is neither a situation where a judgment has been rendered solely against the retailer for strict liability, nor is it one wherein a judgment has been entered against the retailer and the dealer. In those cases the retailer might have an available action for indemnification against the manufacturer. The application of the concept of joint and several liability in those instances would be logical and fair. That

is not true where, as here, reinstatement of the verdict against Southern would result in two fundamentally contradictory verdicts.

The meaning of the verdict of the first trial is ambiguous. The verdict was in the amount of $50,000.00 against Southern and $100,000.00 each against VWAG and VWOA for a judgment totalling $250,000.00. Respondents argued that the verdict was fatally defective because it was an impermissible apportionment of damages against joint tortfeasors, citing *Lanasa v. Beggs*, 159 Md. 311, 151 A. 21 (1931) as well as cases from neighboring sister states.

Petitioners argue that the verdict was not defective. They also argue that respondents are jointly and severally liable and, indeed, the trial court so instructed the jury. However, the verdict cannot be enforced against Southern on the basis of joint and several liability because it was apportioned by the jury. Neither the district court nor the court of appeals addressed this issue. The clear correctness of the order granting a new trial on the grounds cited in their opinions made a determination of this issue unnecessary. A reversal would plunge this case into a quagmire of inconsistent verdicts.

Petitioners assert that the Fourth Circuit's decision conflicts with decisions from other circuits. This is not so. There are three circumstances that together form the foundation for the holdings in this action. First, the case involved multiple tort defendants whose potential liability was closely related, if not identical. Second, two of the defendants moved for judgment n.o.v. and, alternatively, a new trial; one moved for judgment n.o.v. only.

Third, granting a new trial as to less than all of the defendants would cause inconsistent verdicts. Some if not all of these crucial circumstances are missing in each case relied upon by petitioners. *Peterman v. Chicago, Rock Island and Pacific Railroad Co.*, 493 F.2d 88 (8th Cir. 1974), *cert. den.*, 417 U.S. 947, 94 S.Ct. 3072, 41 L.Ed.2d 667 (1975) and *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411 (8th Cir. 1985) each involved a single defendant who moved for judgment n.o.v. only. There was no notice that a new trial might be granted, and there was no potential for inconsistent verdicts. Reason and justice were not disturbed by refusing to allow a new trial.

Tarlton v. Exxon, 688 F.2d 973 (5th Cir. 1982), *cert. den. sub. nom., Diamond M. Drilling Corp. v. Tarlton*, 63 U.S. 1206, 103 S.Ct. 3536, 77 L.Ed.2d 1387 (1983) and *Kain v. Winslow Manufacturing, Inc.*, 736 F.2d 606 (10th Cir. 1984) are the cases most factually similar. In neither was there a danger of contradictory verdicts. In *Tarlton*, despite the existence of a contractual indemnity between Exxon (the defendant that moved for judgment n.o.v. and new trial) and Diamond M (the party that made no post trial motions), each defendant acted independently. In fact, the court of appeals made the specific finding in reviewing the judgment n.o.v. in favor of Exxon that it was free of negligence and that an employee of Diamond M caused the accident. It is certainly not unfair to refuse a new trial to the sole culpable party. In *Kain* the motions for judgment n.o.v. of both defendants were denied. The court granted the motion for new trial of one and denied that of the other. Thus, at time of appeal there was a judgment against one defendant, from which there was no appeal, and a new trial for the other. A refusal to

grant a new trial to the remaining defendant could not lead to conflicting verdicts because the liability of each defendant was independent. The entry of a judgment either for or against the second defendant would not contradict the earlier judgment against the first defendant.

The Federal Rules of Civil Procedure, particularly Rules 50 and 59, provide a sound basis for the rulings below. Two of the three respondents moved for a new trial. This provided notice to petitioners that a new trial might be granted. Since there was no difference in the evidence presented against the respondents, the fact that more than two of the respondents might be granted a new trial did not create an unfair surprise or hardship at the hearing on the motions. This is precisely the case anticipated by Professor Wright (cited by petitioners):

> The ten day limit [found in Rule 59] applies only if there is no timely motion for new trial and the court is acting entirely on its own initiative. Wright & Miller, *Federal Practice and Procedure* § 2813 p.59 (1973).

Petitioners say that the court of appeals declined to address this issue. Yet, petitioners note the case of *Continental Casualty Co. v. United States*, 167 F.2d 107 (9th Cir. 1948), *cert. den.*, 69 S.Ct. 1517 (1948) which supported Professor Wright's view. The court of appeals cited *Continental* in its opinion to support its holding that the ten day rule is inapplicable in a multiple party case where joint liability may lie, and only one party has moved for a new trial. It is implicit that the Fourth Circuit, thereby, settled any Rule 59 issue.

The opinions of the court of appeals and the district court, contrary to petitioners' assertion, were a proper

blend of the application of the letter of the rules and the spirit of fairness. The evidence before the trial court was such that Chief Justice Burger's admonition in his dissent in *Jackson v. Wilson Trucking Corp.*, 243 F.2d 212, 221 (D.C. Cir. 1957) is vividly appropriate:

> If, upon consideration of the motion, briefs and oral argument, the trial court then concludes the evidence is legally sufficient, although contrary to the verdict, it is powerless, under the rule now announced to grant a new trial, even though it is convinced that is the logical and practical relief. I cannot believe that such rigidities were contemplated by the Federal Rules, lauded as a model of "simplicity and flexibility," and a departure from rigid formalism. The majority view presupposes the line between the *legal* insufficiency which would warrant judgment n.o.v. and the insufficiency which would call for only a new trial is clear and sharp. But this is not so. We do not always have black or white but often grays. In many cases there is a blurred area where even the trial judge with all the evidence fresh in mind and convinced the verdict is wrong is unsure as to which relief should be granted because the standard is essentially one of degree. There is no precise and clearly acknowledged boundary marking the lines which all reasonable judges could apply with the same result. It is in this cloudy or doubtful area where the discretion of the trial judge should be allowed widest latitude and he should not be forced to make the kind of appraisal required by the arbitrary limitations imposed by the majority. . . . (Emphasis in original) (footnote omitted).

———o———

CONCLUSION

For the above stated reasons respondents Volkswagenwerk, A.G. and Volkswagen of America, Inc. respectfully request this Honorable Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-79-202

MARTHA U. MOORE and CHARLES J. MOORE, her husband,

vs.

VOLKSWAGENWERK, A.G., a corporation of the Federal Republic of Germany and VOLKSWAGEN OF AMERICA, INC. a New Jersey corporation and SOUTHERN VOLKSWAGEN, INC., a Maryland corporation

JUDGMENT

This action came on for trial before the Court and a Jury, Honorable Norman P. Ramsey, United States District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict, it is Ordered and Adjudged that judgment is entered in favor of Plaintiffs against defendant, Volkswagenwerk, A.G., in the sum of One Hundred Thousand Dollars ($100,000.-00) and in favor of Plaintiffs against defendant, Volkswagen Of America, in the sum of One Hundred Thousand Dollars ($100,000.00) and in favor of Plaintiffs against defendant, Southern Volkswagen, Inc., in the sum of Fifty Thousand Dollars ($50,000.00) for a total judgment in favor of Plaintiffs against Defendants in the sum of Two Hundred Fifty Thousand Dollars and no Cents ($250,-000.00). Dated at Baltimore, Maryland this 23rd day of May, 1984.

Paul R. Schlitz, Clerk

By: /s/ Paul Hanson

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1890

Martha U. Moore; Charles J. Moore,

Appellants,

v.

Volkswagenwerk, A.G., a corporation of the Federal Republic of Germany; Volkswagen of America, Inc., a New Jersey corporation; Southern Volkswagen, Inc., a Maryland corporation,

Appellees.

ORDER

(Filed January 7, 1985)

This appeal comes before us on a second motion to dismiss filed by Southern Volkswagen, Inc. A brief procedural history is necessary.

On May 23, 1984, appellants Martha and Charles Moore obtained a jury verdict against Volkswagenwerk, A.G., Volkswagen of America, Inc., and Southern Volkswagen, Inc. Volkswagenwerk, A.G. and Volkswagen of America timely moved for judgment notwithstanding the verdict or, in the alternative, for a new trial. Southern Volkswagen timely moved only for judgment notwithstanding the verdict. The district court ordered a new trial as to all defendants.

The Moores appealed from that portion of the order granting a new trial as to Southern Volkswagen, assert-

ing their right to immediately appeal from an order granting a new trial where the challenge is to the jurisdiction of the district court to enter the order. *Phillips v. Negley*, 117 U.S. 665 (1886). Because Southern Volkswagen had not moved for a new trial and because the district court did not act within ten days after entry of judgment, the Moores maintain on this appeal that the district court was without jurisdiction to award a new trial as to Southern Volkswagen. *See* Fed. R. Civ. P. 59(d).

The district court clearly had jurisdiction to award a new trial as to Volkswagenwerk, A.G. and Volkswagen of America. The Moores moved, however, to stay retrial pending disposition of the appeal relating to Southern Volkswagen. We denied that motion on October 26, 1984, prior to the date set for a new trial. The Moores declined nevertheless to proceed with retrial, and the district court dismissed the action for failure to prosecute.

Viewing these events, we cannot but conclude that the Moores never intended to go forward with a new trial against Volkswagenwerk, A.G. and Volkswagen of America. As such, their motion for a stay pending appeal was an apparent attempt to hold in parties against whom they had no intention of proceeding. Such a use of the stay provisions is improper and abusive.

Despite our disapproval of the course taken by the Moores, we do not find that these developments entitle Southern Volkswagen to dismissal of this appeal. Accordingly, upon consideration of Southern Volkswagen's second motion to dismiss.

It is ORDERED that the motion is DENIED.

Entered by Judge Murnaghan with the concurrence of Judge Hall and Judge Sprouse.

/s/ Francis D. Murnaghan, Jr.
United States Circuit Judge

DATED: January 7, 1985

Supreme Court, U.S.
FILED
APR 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1498

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MARTHA U. MOORE and CHARLES MOORE,

Petitioners,

vs.

VOLKSWAGENWERK, A.G., VOLKSWAGEN OF AMERICA AND SOUTHERN VOLKSWAGEN, INC.

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Fourth Circuit

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BRIEF OF RESPONDENT SOUTHERN VOLKSWAGEN, INC. IN OPPOSITION

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QUESTION PRESENTED

Does a trial judge who correctly decides to order a new trial as to two defendants have jurisdiction to include in the Order a third defendant who did not file a motion for new trial, but whose liability is completely derivative of and coextensive with that of the two defendants who did so file.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1498

MARTHA U. MOORE and CHARLES MOORE,
Petitioners,

vs.

VOLKSWAGENWERK, A.G., VOLKSWAGEN OF AMERICA AND SOUTHERN VOLKSWAGEN, INC.,
Respondents.

BRIEF OF RESPONDENT SOUTHERN VOLKSWAGEN, INC. IN OPPOSITION

The Respondent, Southern Volkswagen, Inc., ("Southern") opposes the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioners have in their Statement of the Case correctly said that the substantive basis for their action in the District Court as to all three defendants was manufacturer and seller strict liability in tort. Under that theory, the liability of Southern as immediate seller was by definition dependent upon, de-

rivative of, and coextensive with the liability of VOA as intermediate seller and, in turn, of the liability of VWAG as manufacturer.

The jury verdict and judgment entered thereon in the District Court was not, however, as asserted by Petitioners in their Statement of the Case,

> "against the defendants in the amount of $250,000.00."

Instead, the judgment was:

> "in favor of plaintiffs against defendant, Volkswagenwerk, A.G., in the sum of One Hundred Thousand Dollars ($100,000.00), and in favor of plaintiffs against defendant, Volkswagen of America, in sum the sum of One Hundred Thousand Dollars ($100,000.00), and in favor of plaintiffs against defendant, Southern Volkswagen, Inc., in the sum of Fifty Thousand Dollars ($50,00.00) for a total judgment in favor of plaintiffs against defendants in the sum of Two Hundred Fifty Thousand Dollars and no cents ($250,000.00)." *See* Apx. 1.

There was not in that judgment any language of "joint and several" liability.[1]

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[1] Petitioners' assertions at page 8, fn 1 of the Petition, that the 4th Circuit's fear of inconsistent verdicts was unfounded because if the District Court had left the verdict intact "Southern would have been responsible for paying the entire $250,000.00 verdict" is, in view of the judgment actually entered, obviously incorrect.

During the argument before the 4th Circuit, both the amount of the judgment as to Southern and the absence in the judgment

The District Court set that judgment aside and ordered a new trial as to all defendants. The new trial as to all three defendants commenced on October 29, 1984. Petitioners declined to present any evidence and on motions to dismiss made in open court by VWAG, VOA and Southern, final judgments were entered in their favor.

A disclosure of corporate affiliations and financial interests of this Respondent was previously filed with the Fourth Circuit Court of Appeals.

REASON FOR DENYING WRIT

The Decision Below Was Not Bottomed Upon An Interpretation Of Rule 50(b), And Is Not Inconsistent With Any Decision Of Any Other Court Of Appeals.

The question presented as framed by Petitioners is an interesting one, but it did not form the basis for the holding of the Court of Appeals. Although the Court of Appeals, in the course of its *per curiam* opinion, cited *Jackson v. Wilson Trucking Co.*, 243 F.2d 212, it did not depart from the *Jackson* holding and did not adopt or for that matter even mention the *Jackson* dissent.[2]

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of language of joint and several liability figured prominently in questions directed by the panel to counsel. For Petitioners now to so cavalierly dismiss the inconsistent verdict issue without even printing the actual judgment seems to Respondent less than candid.

[2] Southern had raised the *Jackson* issue in Argument II of its Brief in the Court of Appeals, but the 4th Circuit did not reach it. Southern had argued there in favor of the *Jackson* dissent and, alternatively, that the *Jackson* rule was only applicable where the District Court made a specific finding of legal sufficiency of the evidence to support the verdict. It noted that in

The *holding* of the Court of Appeals was that because a new trial was clearly warranted with respect of VWAG and VOA,

> "The trial judge was not compelled to risk inconsistent verdicts by declining to grant a new trial to the remaining defendant."

This holding mirrored the concern expressed by the trial judge who, in ruling on the motions, said if he granted a new trial as to VWAG and VOA, he

> "would have to necessarily grant a new trial as to Southern Volkswagen because the contribution [and indemnification] issue would bring it back to me to pass on the status of Southern in the event of a new trial as to the others."

As previously noted, in the posture that this case went to the jury, the liability of Southern as the immediate seller was wholly dependent upon, derivative of, and coextensive with the liability of VOA as the intermediate seller and, in turn, of the liability of VWAG as manufacturer.

Once the District Court determined that the evidence applicable equally to all three defendants was insufficient to support the judgment of $100,000.00 against VWAG and the judgment of $100,00.00 against VOA, what was the Court to do with the judgment of $50,00.00 against Southern, and with Southern's pending Motion for a judgment of indem-

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the instant case, the District Court did not make such a finding, saying instead that the case was "perilously close" to JNOV, and that it "did not lack confidence" that JNOV should be granted.

nification against VOA and VWAG as its precedessors in the distributive chain—other than that which it did—include Southern in the Order granting a new trial.

The decision of the Court of Appeals, affirming that action, is not in conflict with the decision of any other Court of Appeals.

Petitioners assert that *Jackson v. Wilson, supra.*, *Peterman v. Chicago, R.I. & Pacific RR. Co.*, 493 F.2d 88 (8th Cir., 1974), *cert. den.* 94 S.Ct. 3072, *Alderman v. Tandy Corp.*, 720 F.2d 1234 (11th Cir., 1983), and *Goldsmith v. Diamond Shamrock Corp.*, 767 F.2d 411 (8th Cr. 1985), are in conflict with the decision here of the Fourth Circuit. However, each of those cases involved a *single* defendant or plaintiff whose post-trial motion was for JNOV only. (See in this regard fn 2, *infra*, at page 3). There was not, in any of those cases, *any* timely Motion for New Trial, and no issue of inconsistency of verdicts.

Equally inapposite to the Fourth Circuit's decision here are *Kain v. Winslow*, 736 F.2d 606 (10th Cir., 1984), *cert. den.* 105 S.Ct. 1360, and *Tarlton v. Exxon*, 688 F.2d 973 (5th Cir., 1982), *cert. den.* 103 S.Ct. 3356. In each of these cases, the post-trial motions dispute involved two defendants found liable for *separate* and *independent* acts of negligent or intentional misconduct. Neither case involved the grant of a timely new trial motion in favor of either defendant.

The holding of the Court of Appeals in this case is, in every respect, consistent with its prior holdings in *Maryland Casualty Company v. City of So. Norfolk*, 54 F.2d 1032 (4th Cir., 1936), modified on other grounds, 56 F.2d 822, *cert. den.*, 52 S.Ct. 644 (1936),

and *Werner v. Carbo*, 731 F.2d 204 (4th Cir. 1984), earlier on appeal at 628 F.2d 848, with *cert. den.* at 101 S.Ct. 862, and *Stonehocker v. General Motors Corporation*, 587 F.2d 151 (4th Cir. 1978).

It is equally consistent with the decisions of the Second Circuit in *In Re Barnett*, 124 F.2d 1005 (1942), the Fifth Circuit in *Kicklighter v. Nails By Janee, Inc.*, 616 F.2d 1980), the Eighth Circuit in *Ryan v. McDonough Power Equipment, Inc.*, 734 F.2d 385 (1984), the Ninth Circuit in *Continental Casualty Co. v. United States*, 167 F.2d 107, *cert. den.* 69 S.Ct. 1517 (1948), and the Tenth Circuit in *Daniels v. Gilbreath*, 668 F.2d 477 (1982).

Each of those decisions stands for the proposition that a successful new trial motion or appeal by one party properly extends to another party—including one who may have sought no post-trial or appellate relief—where that other party's liability is derivative of and coextensive with that of the moving party.

CONCLUSION

Southern respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SASSCER, CLAGETT, CHANNING & BUCHER

JAMES P. SALMON
Attorneys for Respondent
14803 Pratt Street
Upper Marlboro, Maryland 20772

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

ARTHA U. MOORE and CHARLES J. MOORE, her husband

vs.

OLKSWAGENWERK, A.G., a corporation of the Federal Republic of Germany and VOLKSWAGEN OF AMERICA, INC. a New Jersey corporation and SOUTHERN VOLKSWAGEN, INC., a Maryland corporation

JUDGMENT

This action came on for trial before the Court and a Jury, Honorable Norman P. Ramsey, United States District Judge, presiding. The issues having been duly tried and the jury having duly rendered its verdict, it is Ordered and Adjudged that judgment is entered in favor of Plaintiffs against defendant, Volkswagenwerk, A.G., in the sum of One Hundred Thousand Dollars ($100,000.00) and in favor of Plaintiffs against defendant, Volkswagen Of America, in the sum of One Hundred Thousand Dollars ($100,000.00) and in favor of Plaintiffs against defendant, Southern Volkswagen, Inc., in the sum of Fifty Thousand Dollars ($50,000.00) for a total judgment in favor of Plaintiffs against Defendants in the sum of Two Hundred Fifty Thousand Dollars and no Cents ($250,000.00)

Dated at Baltimore, Maryland this 23rd day of May, 1984

PAUL R. SCHLITZ, Clerk
By: /s/Paul Hansen
PAUL HANSEN